



The Indiana Prosecutor

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RECENT DECISIONS

TONGUE STUD DETERMINED TO BE "FOREIGN OBJECT"

Guy v. State
805 N.E.2d 835
(Ind. Ct. App. 4/2/04)

When Brenna Guy's car was pulled over, Officer
Corey Shaffer had reason to believe that Guy's

ability to drive her car was impaired. Guy's failure of three field sobriety tests prompted Officer Shaffer to offer her a chemical breath test. Prior to administering the test, Officer Shaffer observed a tongue stud in Guy's mouth. Shaffer did not have Guy remove the stud. He did wait the mandatory 20-minutes and then administered the test. Guy tested .11. Following the breath test, Officer Shaffer placed Guy under arrest. Guy moved to suppress her breath test results. The trial court denied her motion and Guy appealed.

The Court of Appeals' panel that heard the *Guy* case disagreed with a different panel of the court's interpretation of 260 I.A.C. 1.1-4-8(1). Earlier this year the Court of Appeals in *Molnar v. State*, determined that as long as a subject has placed a foreign substance in his mouth more than 20-minutes before a breath test, the test complies with the administrative rule. The current panel found *Molnar* distinguishable from the case upon which they were asked to rule. The *Guy* court concluded that the person to be tested must not have had any foreign substance in his/her mouth within 20-minutes prior to the time a breath test is administered.

The Court also found that Guy had met her burden of proving that the metal stud in her mouth was a "foreign substance". Because Guy had a foreign substance in her mouth not only within 20 minutes of the test, but also during the test, the State could not show that proper breath test procedures were followed, the Court of Appeals concluded. The Court held that the trial court erred when it denied Guy's motion to suppress.

The Attorney General is expected to seek transfer in this case.

**APPEALS COURT: JURY MUST DECIDE
ADDED SEX-OFFENDER PENALTY**

Smith v. State

N.E.2d

(Ind. Ct. App. 3/23/04)

Maurice Smith was charged with criminal deviate conduct, attempted rape, battery, confinement and intimidation. The State further alleged Smith to be a repeat sexual offender by virtue of two prior unrelated rape convictions. A jury found Smith not guilty of criminal deviate conduct, but guilty of all other charges. Smith filed a memorandum challenging the constitutionality of the repeat sexual offender statute. The trial court upheld the constitutionality of the statute and found Smith to be a repeat sexual offender. The trial court sentenced Smith to twenty years on the underlying convictions and to an additional ten years based upon his repeat sexual offender status. Smith appealed.

The Court of Appeals concluded that the right to

have a jury determine the facts and the law regarding a defendant's repeat sexual offender status exists by virtue of Article I, Section 19 of the Indiana Constitution. The Court held that the repeat sexual offender statute, I.C. 35-50-2-14, is unconstitutional on its face and as applied to Smith. The 1999 law incorrectly gave judges the power to make decisions that need to be made by juries, the appeals court said. Consequently, Smith's repeat sexual offender adjudication and sentence enhancement was reversed.

IPAC Executive Director Stephen J. Johnson was quoted in *The Indianapolis Star* saying that prosecutors will work during the 2005 General Assembly session to fix the law so as to give jurors the power to impose additional prison time for defendants they find to be repeat sexual offenders.

The Attorney General is expected to seek transfer in the *Smith* case.